

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 19 December 2006**

**BALCA Case No.: 2005-INA-00209**  
**ETA Case No.: P2002-CA-09538003/JS**

*In the Matter of:*

**BALLARD, ROBINSON & WALKER ACCOUNTANCY CORP.,**  
*Employer,*

*on behalf of*

**LEA MENESES GENECIRAN,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco, California

Appearance: Michael J. Gurfinkel, Esquire  
Glendale, California  
*For the Employer and the Alien*

Before: **Burke, Chapman and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of

the Code of Federal Regulations (“C.F.R.”).<sup>1</sup> We base our decision on the record upon which the CO denied certification and the Employer’s request for review, as contained in the appeal file (“AF”), and any written arguments. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On April 13, 2001, Employer, Ballard, Robinson & Walker Accountancy Corp., filed an application for labor certification to enable the Alien, Lea Geneciran, to fill the position of Bookkeeper. (AF 66). One year of experience in the job offered was required, as were references and verification of work history.

On September 1, 2004, the CO issued a Notice of Findings (“NOF”) proposing to deny certification. (AF 61). The CO found that Employer had failed to document the lawful rejection of U.S. workers, in violation of 20 C.F.R. §656.21(b)(6). Specifically, the CO noted that the Employer was petitioning for a bookkeeper with no educational requirement and one year of experience. One of the applicants appeared qualified. Employer reported that he received the application on October 18, 2002 and sent a certified letter on October 30, 2002. The applicant received the letter on November 1, 2002 and did not reply. Employer indicated that he then attempted to telephone him for an interview but could not reach him.

Upon reviewing the letter sent by Employer, the CO found that the letter did not reference the advertised labor certification position, so the CO found it uncertain whether the applicant was aware that he had been contacted concerning the position.<sup>2</sup> The CO

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<sup>1</sup> This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

<sup>2</sup> The letter, on Employer’s letterhead, consisted of two sentences. (AF 54). The first indicated the applicant had recently applied for a job for the position of Bookkeeper. The second indicated that if the applicant was still interested in the job, he should contact Employer for an interview appointment.

also found that Employer had failed to provide specific information about the subsequent attempt to telephone the applicant, so it was not clear that there had been sufficient attempts made to contact and recruit this applicant. Employer was advised to submit rebuttal which documented fully how Employer attempted to telephone the applicant during the recruitment period and to show how it made a good faith effort to recruit him for the labor certification job.

By letter dated October 4, 2004, Employer filed its rebuttal. (AF 28). Included was a letter from Employer, stating that he had called the U.S. applicant about his job application and resume and left a message on November 25, 2002. The U.S. applicant did not return the call and Employer could not obtain telephone records of local calls from the telephone company. Employer contends that this applicant's resume was received on October 18, 2002 and Employer sent the certified letter to the applicant on October 30, 2002, which, Employer points out, was twelve days after initial contact and therefore timely. Employer contends that as a gesture of good faith, it telephoned the applicant to conduct an interview and when the applicant could not be contacted and did not respond to the message left, that he should contact Employer if he was still interested in the position, it was clear the applicant was, in fact, not interested in the position. According to Employer, the applicant was rejected solely because of his lack of interest in the job offered. Employer objected to the CO's characterization of its letter as not being clear as to the position at issue. Employer contended that its invitation letter was very clear in specifying the proffered job title, indicating Employer's contact information and requesting contact for an interview.

A Final Determination was issued on December 29, 2004. (AF 13). The CO found that Employer failed to provide documentation sufficient to show how this one U.S. applicant at issue was recruited in good faith and therefore rejected for job-related reasons. The CO continued to find that Employer's letter to the applicant, which indicated that it was in reference to the position of bookkeeper, may not have been

sufficient to inform the applicant as to which bookkeeper advertisement was referred to in the letter, as the letter failed to reference the advertisement or any particular information from the job description in the advertisement. The CO noted that while Employer's telephone call should have mitigated that defect, Employer called more than three weeks later. The CO found that rebuttal also failed to provide any information about what Employer had stated in the telephone message.

On January 26, 2005, Employer filed a *Request For Reconsideration Of Final Determination Dated December 29, 2004; Or, In The Alternative, Appeal To BALCA*. (AF 1). On July 11, 2005, the CO denied the Request for Reconsideration and this matter was forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 12).

## **DISCUSSION**

In its appeal to the Board, Employer contends that it does not understand how or why a prospective employer's "specific reference" or lack thereof to a particular newspaper advertisement in the invitation letter would confuse a U.S. worker or discourage a U.S. worker from responding to an invitation letter for a job for which the applicant had applied for consideration. Employer argues that it placed the advertisement properly and was not even named in the advertisement. The only identifying feature of the advertisement was the job interview site. Employer argues that it advertised for a bookkeeper and the applicant responded indicating he was responding to the job for a bookkeeper. The invitation letter clearly set forth the Employer's name, address, and telephone number, and invited the applicant to contact Employer regarding a position to which he had recently applied.

Employer contends that it was reasonable to assume that the applicant had more than enough information to deduce that the letter was for an interview for the position of

a bookkeeper, and he should have had the presence of mind to figure out that it was the position for which he had applied. As the applicant did not respond, Employer found it logical to assume that the applicant was no longer interested in the job.

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§656.1, 656.2(b). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*).

It has been held that reasonable efforts to contact qualified U.S. applicants requires more than a single type of attempted contact. *Diana Mock*, 1988-INA-255 (Apr. 9, 1990); *C'est Pzazz Industries*, 1990-INA-260 (Dec. 5, 1991); *Any Phototype, Inc.*, 1990-INA-63(May 22, 1991). In the instant case, Employer sent a fairly terse letter by certified mail on October 30, 2004. No response was received. Employer then chose to wait until November 25, 2004 to follow up that letter with a telephone call. The telephone call, however, was not timely and cannot be considered a good faith effort.

In *Bay Area Women's Resource Center*, 1988-INA-379 (May 26, 1989) (*en banc*), it was held that where an employer only attempted to contact a U.S. applicant at one of three possible telephone numbers and no attempt was made to contact her by mail, the employer's two messages did not constitute reasonable efforts to contact a qualified U.S. worker. The instant case is no different. Employer had a telephone number, an e-mail address and a home address for this applicant. It chose to wait twelve days to write the applicant a letter requesting that the applicant contact it for an interview if the applicant was still interested, and then waited over five weeks after receipt of the applicant's resume to make a telephone call upon receiving no response to its letter. This does not

constitute good faith recruitment. Labor certification was properly denied, any remaining issues need not be addressed.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400 North  
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.